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who would be affected by this proposal obviously live on modest incomes. In fact, if this proposal had been in effect in 1979, an elderly couple whose income—including the taxable half of its social security benefits—exceeded $7,400 would have to pay additional taxes. And an elderly individual would have an added tax burden if his or her taxable income, including half their social security benefits, exceeded $4,300.

Mr. President, many of these people are already struggling to keep up with the rising cost of everyday living. The rampant inflation has shrunk the buying power of their pensions and eroded the value of their precious savings. This taxing proposal would be tantamount to a significant reduction in social security income for these 10.6 million recipients. Any such change in the tax-free status of social security income is unacceptable in my view.

For nearly 40 years, social security retirees have relied on the policy of the Federal Government to exempt their benefits from taxation. It would be unconscionable to suddenly reverse that longstanding policy on which so many social security beneficiaries have come to depend.

Well over 100 Iowans have written me in opposition to this proposal to tax social security benefits. Many of their letters conveyed a sense of anxiety and confusion aroused by this recommendation to tax half their benefits. It is this consternation which we must eliminate by approving this resolution today. It expresses the sense of the Congress that social security benefits should remain completely exempt from taxation. On July 21, the U.S. House of Representatives overwhelmingly approved an identical resolution. Clearly, that action—combined with the Senate's approval today—should lay to rest any concerns social security recipients have had that their benefits might be taxed.

Therefore, Mr. President, I urge my colleagues to join me in enthusiastically supporting this resolution which will help convey the message to millions of senior citizens that social security benefits will not be taxed.●

● Mr. DOLE. Mr. President, as a cosponsor of Senate Resolution 432, I am pleased to rise in support of this resolution which reiterates a long-standing policy that social security benefits should not be taxed. Tax rulings on this issue indicated over 40 years ago that subjecting benefit payments to income taxation would tend to defeat the underlying purposes of the Social Security Act, and I do not believe anything has occurred which should cause us to change our policy in this regard. More importantly, however, there are two specific reasons for not changing the policy at this time.

First, our citizens are already overburdened by heavy taxes, and it would be unconscionable, particularly in the face of growing economic hardship, to increase that burden on our most vulnerable citizens, that is, those who are on fixed incomes. The average tax increase contemplated by taxation of social security benefits is $350, and that amount represents a substantial reduction in benefits which were both earned by these individuals and promised to them. Certainly, if we ever do decide to include social security benefits in taxable income, it must be done on a prospective basis so that people can plan their retirement and insurance coverage around the reduced benefits.

Second, as pointed out in a Wall Street Journal article which I had reprinted in the CONGRESSIONAL RECORD on May 15, the effect of including social security benefits in taxable income is to "tax the strong earners to support the weak ones." This approach is typical of many Government programs, but individuals are becoming more and more disaffected with programs for which they must pay yet for which they are either ineligible or entitled to receive only a reduced benefit. We cannot afford to take the chance of destroying the incentive to be a strong earner or undermining the support strong earners provide for the social security system. Without their support, the program will not be able to survive.

There is no question in my mind that the Congress does not intend to pass legislation which would tax social security benefits. However, it is important that social security recipients have confidence that we will not take such action. Therefore, I urge my colleagues to support the resolution so we can remove that worry from their minds immediately.●

The resolution (S. Res. 432) was agreed to.

The preamble was agreed to.

The resolution, with its preamble, reads as follows:

S. RES. 432

Whereas social security was establishd to protect the income of Americans against the serious economic risks that families face upon retirement, disability, and death; and

Whereas social security provides a monthly payment to some thirty-five million beneficiaries; and

Whereas the 1979 Advisory Council on Social Security has recommended that half of social security benefits be included in taxable income for Federal incomes taxes; and

Whereas social security benefits are now exempt from Federal taxation; and

Whereas for the people affected, taxing of social security benefits would be tantamount to a cut in benefit payments; and

Whereas 15 to 20 per centum of the elderly—even with social security—are today below the poverty level and all Americans are suffering the effects of inflation; and

Whereas estimates based in 1978 data indicate that taxing one-half of social security benefits would affect 10.6 million tax filing units of the 24.2 million individuals who received social security cash benefits; and

Whereas the estimated impact of this taxation of social security benefits would have increased the average tax liability of those tax units affected in 1968 by $350; and

Whereas the total estimated increase in Federal tax collections in 1978 by the taxation of one-half of social security benefits would be $3,700,000,000; and

Whereas the prospect of possible cuts has alarmed many older Americans and undermined the confidence of Americans in the integrity of the social security program: Now, therefore, be it

Resolved, That it is the sense of the Senate that the Social Security Advisory Council's recommendation that one-half of social security benefits should be subject to taxation would adversely affect social security recipients and undermine the confidence of American workers in the social security programs, that social security benefits are and should remain exempt from Federal taxation, and that the Ninety-sixth Congress will not enact legislation to implement the Advisory Council's recommendation.

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the resolution was agreed to.

Mr. BAKER. Mr. President, I move to lay that motion on the table.

The motion to lay on the table was agreed to.

PRIVACY PROTECTION ACT OF 1980

The Senate proceeded to consider the bill (S. 1790) entitled the "Privacy Protection Act of 1979", which had been reported from the Committee on the Judiciary with an amendment to strike all after the enacting clause and insert the following:

That this Act may be cited as the "Privacy Protection Act of 1980".

TITLE I—FIRST AMENDMENT PRIVACY PROTECTION

Part A—Unlawful Acts

SEC. 101. (a) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense to search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or effecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has committed or is committing the criminal offense, for which such materials are sought: *Provided, however*, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense for which such materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783)); or

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being.

(b) Notwithstanding any other law, it shall be unlawful for a government officer or employee, in connection with the investigation or prosecution of a criminal offense, to search for or seize documentary materials, other than work product materials, possessed by a person in connection with a purpose to disseminate to the public a newspaper, book, broadcast, or other similar form of public communication, in or affecting interstate or foreign commerce; but this provision shall not impair or affect the ability of any government officer or employee, pursuant to otherwise applicable law, to search for or seize such materials, if—

(1) there is probable cause to believe that the person possessing such materials has

committed or is committing the criminal offense for which such materials are sought: *Provided, however*, That a government officer or employee may not search for or seize such materials under the provisions of this paragraph if the offense for which such materials are sought consists of the receipt, possession, communication, or withholding of such materials or the information contained therein (but such a search or seizure may be conducted under the provisions of this paragraph if the offense consists of the receipt, possession, or communication of information relating to the national defense, classified information, or restricted data under the provisions of section 793, 794, 797, or 798 of title 18, United States Code, or section 224, 225, or 227 of the Atomic Energy Act of 1954 (42 U.S.C. 2274, 2275, 2277), or section 4 of the Subversive Activities Control Act of 1950 (50 U.S.C. 783));

(2) there is reason to believe that the immediate seizure of such materials is necessary to prevent the death of, or serious bodily injury to, a human being;

(3) there is reason to believe that the giving of notice pursuant to a subpena duces tecum would result in the destruction, alteration, or concealment of such materials; or

(4) such materials have not been produced in response to a court order directing compliance with a subpena duces tecum, and—

(A) all appellate remedies have been exhausted; or

(B) there is reason to believe that the delay in an investigation or trial occasioned by further proceedings relating to the subpena would threaten the interest of justice.

(c) In the event a search warrant is sought pursuant to paragraph (4)(B) of subsection (b), the person posssessing the materials shall be afforded adequate opportunity to submit an affidavit setting forth the basis for any contention that the materials sought are not subject to seizure.

Part B—Remedies, Exceptions, and Definitions

SEC. 105. This Act shall not impair or affect the ability of a government officer or employee, pursuant to otherwise applicable law, to conduct searches and seizures at the borders of, or at international points of, entry into the United States in order to enforce the customs laws of the United States.

SEC. 106. (a) A person aggrieved by a search for or seizure of materials in violation of this Act shall have a civil cause of action for damages for such search or seizure—

(1) against the United States, against a State which has waived its sovereign immunity under the Constitution to a claim for damages resulting from a violation of this Act or against any other governmental unit, all of which shall be liable for violations of this Act by their officers or employees while acting within the scope or under color of their office or employment; and

(2) against an officer or employee of a State who has violated this Act while acting within the scope or under color of his office or employment, if such State has not waived its sovereign immunity as provided in paragraph (1).

(b) It shall be a complete defense to a civil action brought under paragraph (2) of subsection (a) that the officer or employee had a reasonable good faith belief in the lawfulness of his conduct.

(c) The United States, a State, or any other governmental unit liable for violations of this Act under subsection (a)(1), may not assert as a defense to a claim arising under this Act the immunity of the officer or employee whose violation is complained of or his reasonable good faith belief in the lawfulness of his conduct, except that such a defense may be asserted if the violation complained of is that of a judicial officer.

(d) The remedy provided by subsection (a)(1) against the United States, a State, or any other governmental unit is exclusive of any other civil action or proceeding for conduct constituting a violation of this Act, against the officer or employee whose violation gave rise to the claim, or against the estate of such officer or employee.

(e) Evidence otherwise admissible in a proceeding shall not be excluded on the basis of a violation of this Act.

(f) A person having a cause of action under this section shall be entitled to recover actual damages but not less than liquidated damages of $1,000, such punitive damages as may be warranted, and such reasonable attorneys' fees and other litigation costs reasonably incurred as the court, in its discretion, may award: *Provided, however*, That the United States, a State, or any other governmental unit shall not be liable for interest prior to judgment.

(g) The Attorney General may settle a claim for damages brought against the United States under this section, and shall promulgate regulations to provide for the commencement of an administrative inquiry following a determination of a violation of this Act by an officer or employee of the United States and for the imposition of administrative sanctions against such officer or employee, if warranted.

(h) The district courts shall have original jurisdiction of all civil actions arising under this section.

SEC. 107. (a) "Documentary materials", as used in this Act, means materials upon which information is recorded, and includes, but it not limited to, written or printed materials, photographs, tapes, videotapes, negatives, films, out-takes, and interview files, but does not include contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used as, the means of committing a criminal offense.

(b) "Work product materials", as used in this Act, means materials, other than contraband or the fruits of a crime or things otherwise criminally possessed, or property designed or intended for use, or which is or has been used, as the means of committing a criminal offense, and—

(1) in anticipation of communicating such materials to the public, are prepared, produced, authored, or created, whether by the person in possession of the materials or by a person other than the person in possession of the materials;

(2) are possessed for the purposes of communicating such materials to the public; and

(3) include mental impressions, conclusions, opinions, or theories of the person who prepared, produced, authored, or created such material.

(c) "Any other governmental unit", as used in this Act, includes the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, and any local government, unit of local government, or any unit of State government.

SEC. 108. The provisions of this title shall become effective on October 1, 1980, except that insofar as such provisions are applicable to a State or any governmental unit other than the United States, the provisions of this title shall become effective one year from the date of enactment of this Act.

TITLE II—ATTORNEY GENERAL GUIDELINES

SEC. 201. (a) The Attorney General shall, within six months of the date of enactment of this Act, issue guidelines for the procedures to be employed by any Federal officer or employee, in connection with the investigation or prosecution of a criminal offense, to obtain documentary materials in the private possession of a person when the person is not reasonably believed to be a suspect in such offense or related by blood or marriage to such a suspect, and when the materials are sought are not contraband or the fruits or instrumentalities of an offense. The Attorney General shall incorporate in such guidelines—

(1) a recognition of the personal privacy interests of the person in possession of such documentary materials;

(2) a requirement that the least intrusive method or means of obtaining such materials be used which do not substantially jeopardize the availability or usefulness of the materials sought to be obtained; and

(3) a recognition of special concern for privacy interests in cases in which a search or seizure for such documents would intrude upon a known confidential relationship.

(b) The Attorney General shall collect and compile information on, and report annually to the Committees on the Judiciary of the Senate and the House of Representatives on, the use of search warrants by Federal officers or employees for documentary materials described in subsection (a)(3).

(c) An issue relating to the compliance, or to the failure to comply, with guidelines issued pursuant to this section may not be litigated, and a court may not entertain such an issue as a basis for the suppression or exclusion of evidence.

The PRESIDING OFFICER. The question is on agreeing to the committee amendment.

The committee amendment was agreed to.

● Mr. THURMOND. Mr. President, the legislation being considered by the Senate today is a response to the Supreme Court's decision in Zurcher against Stanford Daily, which upheld the search of a newsroom for criminal evidence by law enforcement officials.

This legislation, S. 1790, seeks to strike a careful balance between the first amendment right to free expression and the fourth amendment which permits the Government to search private property under certain circumstances. This is a difficult balance to achieve in any legislative proposal but was not, in my opinion, achieved totally in this bill. Although title I of the bill addresses the concerns of the press and journalists, and I strongly support that part of this legislation, I do have reservations about other portions of the bill that are to be now covered by Attorney General guidelines.

Mr. President, my concerns about titles II and III of the original bill, now to be implemented by guidelines, rest basically on considerations that indicate legitimate law enforcement may be impeded by even the regulatory effect of these provisions.

The extension of search protection to selected groups has the potential for creating sanctuaries for evidence necessary to the effective investigation and prosecution of crime, particularly in the case of lawyers whose clients will urge that they hold incriminating evidence. Concern about the creation of sanctuaries is not without substance, for experience under existing law reveals numerous attempts to use the attorney-client privilege as a basis for refusal to produce nonprivileged, incriminating evidence. This problem will be accentuated

for the FBI as it attempts to shift its criminal investigative efforts to large scale white collar crime and political corruption cases.

Mr. President, even though search protection guidelines would apply only to "innocent" third parties, it must be recognized that it is often difficult, especially at the early stages of an investigation, to determine the identity of suspects and co-conspirators. This is particularly true in white collar corruption cases where doctors, lawyers, accountants, or other "privilege" professions serve as conduits for illegal financial transactions. The problem of defining "innocent" third parties becomes particularly severe if protections are extended to these groups.

In addition, subpenas are not available at all stages of an investigation or prosecution. In many areas, Federal grand juries do not sit continuously, and most States do not regularly use grand juries. Also, a grand jury subpena may not appropriately be used to continue to gather evidence after indictment. Because of these gaps in the availability of subpenas, a prohibition of searches may leave prosecutors with no judicially enforceable investigative tools. There will also be considerable time and manpower problems caused by extended litigation over the application of a search protection statute for selected groups. It is unrealistic, for example, to expect that lawyers will not zealously pursue appeals to adverse decisions under a search protection situation.

Because of a desire to avoid the appearance that he has acted to breach the confidentiality of the relationship, a third party—doctor, lawyer, or organized crime associate—may prefer the passive role provided him by a search warrant to being placed in the position of having to take a seemingly active role in complying with a subpena in order to avoid contempt charges. Since there are few legitimate reasons for failure to comply with a subpena in most cases where a subpena is issued, the third party may find that he is in the position of disclosing information sought by subpena.

The exception in the bill, where document destruction or concealment may occur under which a search warrant can be obtained, requires substantial knowledge of the relationship enjoyed by the third party and the subject of the investigation. Does this mean that we probe into the nature of friendships or tightness of family ties? As Assistant Attorney General Heymann observed in his testimony before the Senate Subcommittee on the Constitution, this does not seem to serve privacy interests.

Mr. President, in summary, while the problems of identifying suspects, assessing the probability of destruction of evidence, and the difficulties caused by delays occasioned by application of search protection legislation and attendant litigation is a difficult one, the need to protect values of constitutional proportion in writing other than press search guidelines may tip the balance in favor of limiting searches despite these law enforcement interests. In my opinion, a number of amendments which were offered in committee, and which I supported, would have given more weight to law enforcement and brought more closely into balance the first and fourth amendments. This is particularly true of the amendment offered by Senator SIMPSON on national security matters and amendments by Senator HATCH regarding the potential destruction of documents by someone now covered by the "work-product" protections of the bill.

The "subpena first" rule established by this legislation goes beyond in some ways, the constitutional underpinnings of the fourth amendment. S. 1790, however, goes even further in some respects, by exempting "work-product" materials from a search warrant even if it is possible that the use of a subpena may lead to the destruction or concealment of documents to be used at trial.

As far back as 1932, the Supreme Court in United States against Lefkowitz held that search warrants could be issued for the seizure of contraband and the fruits and instrumentalities of crime. The Court has also declared that "mere evidence" alone, including "papers", were not to be among the classes of property considered for seizure by warrant (See *Gouled* v. *United States*, 255 U.S. 298 (1921).) In 1967, however, the Supreme Court in *Warden* v. *Hayden* (387 U.S. 294) (1967) overturned the mere evidence rule and it is now settled that evidentiary items as fingerprints, blood, conversations, and other demonstrative evidence may be obtained through the warrant process or even without a warrant under certain circumstances. In effect, S. 1790, by denying law enforcement officials the ability to obtain a search warrant where potential evidence of a crime is in the hands of a nonsuspect journalist, goes beyond the holding in Zurcher.

It is unreasonable to assume that the possibility for concealment or destruction of evidence does not exist with a "subpena-first" rule, even where such evidence is in the hands of a nonsuspect person. As the Court in Zurcher stated:

> The seemingly blameless third party in possession of the fruits or evidence may not be innocent at all; and if he is, he may nevertheless be so related to or so sympathetic with the culpable that he cannot be relied upon to retain and preserve the articles that may implicate his friends, or at least not to notify those who would be damaged by the evidence that the authorities are of its location. (*Zurcher* v. *Stanford Daily*, 436 U.S. 547, at 561 (1978).)

The Court goes on in a footnote to point out that even if the innocent party is not in a position to be sympathetic or related to the likely criminal(s), the use of a subpena duces tecum may be a problem for law enforcement:

> It is also far from clear, even apart from the dangers of destruction and removal, whether the use of the subpoena duces tecum under circumstances where there is probable cause to believe that a crime has been committed and that the materials sought constitute evidence of its commission will result in the production of evidence with sufficient regularity to satisfy the public interest on law enforcement. (supra, at 561).

Mr. President, the first amendment rights of the press to collect, compile, and disseminate information must be preserved. It is necessity, however, to void the availability of search warrants in all cases where "work-product" materials are involved is going too far. Even the Supreme Court recognizes that this situation should be approached on a case-by-case basis where a search warrant is issued with specific preconditions now required by the Court. In *Roaden* v. *Kentucky*, 413 U.S. 496, 501 (1973), the Court stated:

> A seizure reasonable as to one type of material in one setting may be unreasonable in a different setting or with respect to another kind of material.

Congress is getting on very thin ice, in my opinion, in trying to exempt materials and persons across the board where there may be a legitimate law enforcement purpose involved. The few opportunies for abuse do not seem to warrant the lengths to which S. 1790 goes in order to protect the press from warranted searches and seizures.

This concern becomes more serious, in my opinion, when extended to the national security area. Under the provisions of this legislation, documenary materials would only be subject to seizure by law enforcement officials where the custodian of the materials is suspected of criminal acts. In other words, if the New York Times came into possession of material relating to the operation and location of the DEW system, and no crime had been committed by anyone with the New York Times, a subpena could be resisted and no search warrant could be issued. This would be most unfortunate, especially if it were determined that the documentary materials had been stolen and an offense of espionage or treason were possibly involving a third party. Since the New York Times is an innocent party, a criminal investigation may be unnecessarily delayed if for some reason immediate cooperation is not forthcoming. I find it difficult to understand where the security of our Nation is involved, anyone should be immune from a properly issued and executed search warrant. Even if documentary materials are involved, and not "work-product" materials, the dangers of delay due to a possible dispute over the distinction between the two is not particularly comforting to this Senator. For that reason, I hope the guidelines to be issued give special consideration to national security concerns.

Mr. President, although I will vote in favor of this legislation, I wanted to express some of my remaining reservations about titles II and III, in hopes that the the information of guidelines in this area.●

● Mr. DOLE. Mr. President, in May of 1978, the Supreme Court issued a decision in the case of Zurcher against Stanford Daily. The Court held that police officers, armed with a warrant, could forcibly and without notice search a person's home or office for evidence of a crime, even if that person were in no way suspected of criminal activity. The legislation that is before us today would

limit governmental search and seizure of documentary evidence in possession of nonsuspects.

CONGRESSIONAL ACTION

Less than 1 month after the opinion was issued, the Senate Judiciary Committee's Subcommittee on the Constitution, began 4 days of hearings on the problems associated with the Stanford Daily decision and several possible legislative answers. The Senator from Kansas introduced legislation that was designed to deal with some of the problems that the court's decision created. No action was taken in the 95th Congress. In April of the first session of the 96th Congress, the administration proposed a bill to provide the protection of the subpena-first rule to those engaged in first amendment activities for Federal, State, and local law enforcement authorities. This proposal, S. 855, was later incorporated in S. 1790 as tiles I and IV of the legislation. Title II was added in September of 1979 to afford protection against unannounced searches to those in possession of documentary materials which would be privileged in the jurisdiction in which they are to be found and title III was designed to extend protection to all innocent third parties holding documentary evidence.

THE FOURTH AMENDMENT

The boundaries between citizens and their Government must be carefully observed. Throughout the history of our Nation, concern has been expressed about intrusion by the Government into lives and property of Americans. The fourth amendment was drafted to address these concerns. It expresses an eloquent, unequivocal principle of democratic government, "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The fourth amendment's guarantee sprang directly from the colonial era when warrantless searches were routinely employed by British soldiers to enforce the crown's tax laws. Since then, the scope of fourth amendment protections has been broadened, and through the 14th, made applicable to the States. This expansion has been concurrent with and supportive of the still-evolving "right to privacy" to which every American is entitled.

PRIVACY

The right to privacy has no specific constitutional base. The essential notion of an individual's right to be left alone by Government is not found in any one clause or amendment in the Constitution. Instead, privacy rights are implicit in the scheme of democratic statecraft. Americans have always felt that the Government should not intrude in their personal lives or business without an adequate justification.

The existence of a right to privacy is firmly established in constitutional law, but no concrete definition of the scope of the right has ever been enunciated. Rather, on a case-by-case basis, the parameters of constitutional protection for privacy are being established.

The Senator from Kansas is aware of the fact that it is difficult to strike a proper balance between shielding private information from inquiring eyes and making enough of it available to answer fair questions.

CONCERNS OF LAW ENFORCEMENT

Mr. President, the legislation before us will enhance the constitutional guarantees of privacy, while in no way impairing legitimate law enforcement interests. The intent and effect of the procedure advocated in this legislation is to protect the privacy of Americans from intrusion by police officers, where that intrusion is unnecessary.

The Senator from Kansas is aware of the difficult problems confronting law enforcement officials today. The responsibility of bringing criminals to justice is more difficult now than ever before. Yet, the issue presented by the Stanford Daily case is substantially different from most constitutional conflicts that affect law enforcement. It dealt solely with individuals not suspected of any criminal involvement. The Supreme Court's decision limited the rights of citizens who may have evidence relating to a crime but have not committed any criminal offense.

SCOPE OF INVESTIGATIVE ACTIVITY

It is the opinion of the Senator from Kansas that the Stanford Daily decision overextended the permissible scope of investigatory activity. This is not fully consistent with American ideals of justice. Effective enforcement of the law requires that citizens respect those responsible for the safety of the community. That respect can only be established when citizens are certain that the law will also respect their rights.

The Senator from Kansas urges his colleagues to join him in supporting this important piece of legislation.●

● Mr. HATCH. Mr. President, I rise in support of S. 1790, the proposed Privacy Protection Act. This measure would limit Federal, State, and local governments in their ability to secure search warrants to obtain documentary materials in the possession of persons engaged in the "dissemination of information to the public". S. 1790 is a response to the Supreme Court's decision Zurcher against Stanford Daily 436 U.S. 547 (1978) in which the Court upheld the search of a newspaper file room for photographs incriminating a group of protestors who had attacked and injured nine policemen.

I rise in support of S. 1790, however, not because I wish to overturn Stanford Daily. I feel that it was a correct decision. I rise because I wish to insure that the case is limited to its immediate fact situation. I do not wish to see this decision used as justification for increasingly commonplace searches of newspaper file rooms and similar locations.

At this point in the RECORD, I submit the additional views of myself and my friend and colleague from Wyoming (Mr. SIMPSON). These views summarize my hesitations about this generally meritorious legislation:

The views follow:

ADDITIONAL VIEWS OF SENATORS ORRIN HATCH AND ALAN SIMPSON

I. INTRODUCTION

Each of us has supported S. 1790, the Privacy Protection Act, in both subcommittee and the full Judiciary Committee. We recognize the unique needs of the journalism profession, and the unique role that the press is accorded in our constitutional framework. Each of us, too, is committed to the principle that the Government ought to employ the least intrusive, practicable means to secure information that is necessary for criminal proceedings, not only with respect to journalists, but with respect to all individuals.

The fourth amendment to the Constitution establishes the basic standard that searches and seizures must not be "unreasonable". As Justice Powell noted in his concurring opinion in Zurcher v. Stanford Daily:

"The magistrate must judge the reasonableness of every warrant in light of the circumstances of the particular case * * *. A magistrate asked to issue a warrant for the search of press offices can and should take cognizance of the independent values protected by the first amendment."

The Stanford Daily case held that the Constitution does not require a magistrate to conclude that warrant searches of the press are necessarily "unreasonable". The committee in adopting S. 1790 is, in effect, instructing magistrates and others empowered to issue warrants that a search directed at the documentary materials of journalists is to be considered in itself "unreasonable" in the absence of certain enumerated circumstances. For this reason, a 'subpoena-first' rule is established with respect to most documentary materials in the possession of journalists. In adopting S. 1790, the committee is establishing protections for journalists that are permitted, but not required, by the Constitution.

II. DEPARTURE FROM "SUBPOENA-FIRST" RULE

One of our two major concerns with the final committee product is its departure from a mere 'subpoena-first' rule with respect to a journalist's "work product". The bill instead adopts a rule that may absolutely prevent material from being secured for use at trial. In contrast to other documentary materials, "work product" materials connot be obtained through warrants even (1) when there is reason to believe that the giving of notice pursuant to a subpoena would result in the destruction, alteration, or concealment of evidence; or (2) when a subpoena has already been disobeyed and all appellate remedies have been exhausted.

The Stanford Daily case underscores the potential for abuse under this approach. There, the newspaper had announced a policy of destroying any photographs in their possession that might aid in the prosecution of a group of protestors who had attacked and injured nine policemen. At oral argument before the U.S. Supreme Court, the counsel for the newspaper participated in the following exchange with several of the justices:

Question. Let us assume you had a picture of the commission of a crime. For example, in banks they take pictures regularly of, not only of robbery but of murder committed in a bank and there have been pictures taken of the actual pulling of the trigger or the pointing of the gun and pulling of the trigger. There is a very famous one related to the assassination of President Kennedy.

What would the policy of the Stanford Daily be with respect to that? Would it feel free to destroy it at any time before a subpoena had been served?

Mr. FALK. The—literally read, the policy of the DAily requires me to give an affirmative answer. I find it hard to believe that in an example such as that, that the policy would have been carried out. It was not addressed to a picture of that kind or in that context.

Question. Well, I am sure you were right. I was just getting to the scope of your theory.

Mr. FALK. Our——

Question. What is the difference between the pictures Justice Powell described and the pictures they were thought to have?

Mr. FALK. Well, it simply is a distinction that——

Question. Attacking police officers instead of the President.

That is the only difference.

Under S. 1790, as reported, such materials in the possession of a newspaper like the Stanford Daily would be totally unobtainable by the Government. The sixth amendment rights of individuals to a fair trial, and the interests of society in having its laws enforced, may well be compromised by a policy that makes these materials wholly inaccessible for the criminal justice process.

The only recourse against a journalist who refuses to comply with a subpoena for his "work-product" is contempt of court. The argument that the contempt sanction is an adequate remedy is not persuasive. While a contempt citation may punish an individual, it establishes no control over the sought-after information; it does not secure the information needed for the criminal trial or investigation. Further, even when contempt sanctions are ultimately successful in inducing individuals to comply with subpoenas, the delay involved may seriously inhibit or block an investigation.

The lack of a destruction of evidence exception for "work-product" is particularly regrettable in that it can only serve to benefit the few highly irresponsible members of the journalism profession who seek to withhold evidence from the criminal justice system. The overwhelming preponderance of press in this country are not likely to destroy evidence or refuse to cooperate with law enforcement officials. Documentary materials in their possession would normally be available through subpoenas. These journalists have no need to be afforded any enhanced protections since there would be no "reason to believe" that they would destroy, alter or conceal documents. It is only the irresponsible press which will have the opportunity to seize upon the absolutists protections in S. 1790.

There is no precedent for a policy that would place in the hands of private individuals the determination whether or not materials needed in a criminal trial or investigation are to be made available to the courts.

It must be emphasized that S. 1790 is not a "shield" law; it does not protect sources or informants. The greatest protection is given to "work product" materials which by definition must be intended for public dissemination. Other documentary materials may be obtained through warrant searches under circumstances described above. Even if a subpoena is used, however, the "shield" law issue remains; in the absence of specific legislation, the journalist must supply the desired materials intact (including the name of the source, if that is part of a requested document) or face punishment for contempt. S. 1790 does not change this.

III. "WORK-PRODUCT" VERSUS "NON-WORK-PRODUCT"

It is worth emphasizing also that it is not the "privacy" interests of the journalist that justify his preferred treatment under S. 1790. For example, personal diaries of the journalist, like anyone else, are not immune from warrant searches. Rather, it is his first amendment-related activity of disseminating information that is accorded unique protections. Yet, nothing stemming from the first amendment would justify the distinction between "work-product" and "non-work-product". The basis for exceptional treatment is the journalist's intention to disseminate information to the public and his creativeness, or the amount of energy he has exerted, in developing materials.

We believe the "work-product—non-work-product" distinction may well prove to be an unworkable burden for the average magistrate or policeman-on-the-street. He will have to engage in some remarkably rapid and sophisticated analysis in order to determine what materials are obtainable through warrants, under what circumstances, and subject to what exceptions. He himself may have to engage in a form of "mind reading" in order to decide such matters as whether or not documentary materials are possessed "in anticipation of communicating such materials to the public".

IV. NATIONAL SECURITY

Our second major concern arises because the bill as reported does not contain an adequate national security exception.

As S. 1790 is now drafted, documentary materials needed for an investigation or prosecution of serious crimes involving the national security, including treason, sabotage, and espionage, would not be subject to a warrant search, even if there were probable cause to believe that the delay or notice involved in the use of a subpoena would substantially reduce the availability or usefulness of the evidence. This would be true regardless of how serious was the threat to national security of the criminal actions being investigated, with certain very limited exceptions.

The national security exception now provided in the bill would only cover situations where the custodian of the needed documentary materials was himself suspected of the crime being investigated. In most investigations, therefore, a search warrant could be used only if one of the other very narrow exceptions were available. These exceptions are not adequate to cover all potential national security needs. For "work-product," as we stated earlier, an exception allowing use of a search warrant would not be available even if there were reasons to believe that the giving of notice pursuant to a subpoena would result in the destruction, alteration or concealment of the needed materials. Furthermore, the use of a subpoena involves other risks besides that of giving notice. In a critical national security investigation the delay involved in the subpoena procedure, even if the subpoena is obeyed, may well lead to crucially needed documentary materials being obtained too late.

S. 1790 as reported does not reflect the high priority given to national security in other legislation. Wiretap provisions—of both existing law and the proposed Criminal Code reform bill reported by the Judiciary Committee—recognize that the needs of national security can sometimes make reasonable what would otherwise be unreasonable, namely an invasion of the privacy interests of Americans even without prior judicial authorization.

It is worth emphasizing that in this bill we are not dealing with judicially unauthorized searches, or with a statute that pushes government power toward the limit of what the Constitution permits. S. 1790 does the opposite—it provides that government pull back from that Constitutional limit, restricting even Constitutionally proper warrant searches. We are in effect saying that, especially when communication to the public is involved, subpoenas should be used except in certain very limited circumstances.

The press and other persons disseminating information and opinion to the public are not exempt from the wiretap statutes. The national security provisions which apply to everyone else apply to them as well. It is even less appropriate that they be exempt from searches authorized by warrant when important national security interests are at stake, when the criminal activity being investigated consists of treason, sabotage, or espionage.

We find it difficult to understand how when the security of our nation is at stake, the press or any person with documentary materials necessary to an investigation of these serious offenses should be immune from Constitutionally proper warrant searches. In our view when the delay and the notice inherent in the subpoena procedure would jeopardize the availability or usefulness of the materials needed for such an investigation, a warrant search should be available.

The fact that the Federal Government has never searched the press for national security materials does not mean that the need may not arise in the future. Since the government has the authority to conduct such searches now, the fact that it has never found it necessary to do so makes it likely that in the future such searches would be very rare or non-existent. That is certainly our intent.

It has been claimed that the instances in which needed national security information would be considered "work product" would be "extremely rare" and that for documentary materials which are not "work product," the destruction of evidence exception would be available. The claim that needed materials would seldom be "work product," even if true, would not be very comforting when those "extremely rare" instances occurred. Furthermore, as we have already stated, even for "non-work product" materials, the existing exceptions do not adequately cover the risk of delay.

V. LAW ENFORCEMENT POSITION

Finally, we note that Justice Department and F.B.I. officials have not publicly requested a destruction of evidence exception for "work product" or a broader national security exception. This does not surprise us since the relevant part of S. 1790, Title I, was drafted by the Justice Department and proposed as the official position of the Administration, to which particular representatives would not be in a position to object. Law enforcement officials not subject to the same political constraints, for example the National District Attorneys' Association, have expressed support for amendments in both these areas.

The PRESIDING OFFICER. The question is on the engrossment and third reading of the bill.

The bill was ordered to be engrossed for a third reading, was read the third time, and passed.

The title was amended so as to read:

A bill entitled the "Privacy Protection Act of 1980".

Mr. ROBERT C. BYRD. Mr. President, I move to reconsider the vote by which the bill was passed and the title amendment was adopted.

Mr. BAKER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

BUDGET ACT WAIVER

The resolution (S. Res. 487) waiving section 402(a) of the Congressional Budget Act of 1974 with respect to the

consideration of H.R. 5766, was considered and agreed to, as follows:

Resolved, That pursuant to section 402(c) of the Congressional Budget Act of 1974, the provisions of section 402(a) of such Act are waived with respect to the consideration of H.R. 5766, a bill to amend title 10, United States Code, to authorize additional Reserve Officer's Training Corps scholarships for the Army, to provide a certain number of such scholarships for cadets at military junior colleges, to authorize the Secretary of the Army to provide that cadets awarded such scholarships may serve their obligated period of service in the Army Reserve or Army National Guard of the United States, and for other purposes.

Such a waiver is necessary because section 402(a) of the Congressional Budget Act of 1974 provides that it shall not be in order in either the House of Representatives or the Senate to consider any bill or resolution which, directly or indirectly, authorizes the enactment of new budget authority for a fiscal year, unless that bill or resolution is reported in the House or the Senate, as the case may be, on or before May 15 preceding the beginning of such fiscal year.

For the foregoing reasons, pursuant to section 402(c) of the Congressional Budget Act of 1974, the provisions of section 402(a) of such Act are waived with respect to H.R. 5766, as reported by the Committee on Armed Services.

Mr. ROBERT C. BYRD. I move to reconsider the vote by which the resolution was agreed to.

Mr. BAKER. I move to lay that motion on the table.

The motion to lay on the table was agreed to.

RESERVE OFFICERS' TRAINING CORPS SCHOLARSHIPS

The Senate proceeded to consider the bill (H.R. 5766) to amend title 10, United States Code, to authorize additional Reserve Officers' Training Corps Scholarships for the Army, to provide a certain number of such scholarships for cadets at military junior colleges, to authorize the Secretary of the Army to provide that cadets awarded such scholarships may serve their obligated period of service in the Army Reserve or Army National Guard of the United States, and for other purposes, which had been reported from the Committee on Armed Services with an amendment to strike all after the enacting clause and insert the following:

That (a) section 2107(a) of title 10, United States Code, relating to financial assistance for specially selected members of the Reserve Officers' Training Corps, is amended by striking out the period at the end of the first sentence and all of the second sentence and inserting in lieu thereof a comma and the following: "except that the age of any such member who has served on active duty in the armed forces may exceed such age limitation on such date by a period equal to the period such member served on active duty, but only if such member will be under 29 years of age on such date.".

(b) Section 2107 of such title is further amended—

(1) by inserting "and" at the end of clause (4) of subsection (b);

(2) by striking our clauses (5) and (6) of subsection (b) and inserting in lieu thereof the following:

"(5) agree in writing that, at the discretion of the Secretary of the military department concerned, he will either—

"(A) (i) accept an appointment, if offered, as a commissioned officer in the Army, Navy, Air Force, or Marine Corps, as the case may be, and that, if he is commissioned as a regular officer and his regular commission is terminated before the sixth anniversary of his date of rank, he will accept an appointment, if offered, in the reserve component of that armed force and not resign before that anniversary; and

"(ii) serve on active duty for four or more years; or

"(B) (i) accept an appointment, if offered, as a commissioned officer in the Army, Navy, Air Force, or Marine Corps, as the case may be; and

"(ii) serve in a reserve component of that armed force until the eighth anniversary of the receipt of such appointment, unless otherwise extended by subsection (d) of section 2108 of this title, under such terms and conditions as shall be prescribed by the Secretary of the military department, concerned.

The performance of service under clause (5) (B) may include periods of active duty, active duty for training, and other service in an active or inactive status in the reserve component in which appointed."; and

(3) by striking out "6,500" the first place it appears in subsection (h) and inserting in lieu thereof "12,000".

(c) (1) Chapter 103 of such title, relating to Senior Reserve Officers' Training Corps, is amended by inserting after section 2107 the following new section:

"§ 2107a. Financial assistance program for specially selected members: military junior colleges

"(a) (1) The Secretary of the Army may appoint as a cadet in the Army Reserve or Army National Guard of the United States any eligible member of the program who is a student at a military junior college and who will be under 25 years of age on June 30 of the calendar year in which he is eligible under this section for appointment as a second lieutenant in the Army, except that the age of any such member who has served on active duty in the armed forces may exceed such age limitation on such date by a period equal to the period such member served on active duty, but only if such member will be under 29 years of age on such date.

"(2) To be considered a military junior college for the purposes of this section, a school must be a civilian postsecondary educational institution essentially military in nature that does not confer baccalaureate degrees and that meets such other requirements as the Secretary of the Army may prescribe.

"(b) To be eligible for appointment as a cadet under this section, a member of the program must—

"(1) be a citizen of the United States;

"(2) be specially selected for the financial assistance program under this section under procedures prescribed by the Secretary of the Army;

"(3) enlist in a reserve component of the Army for the period prescribed by the Secretary of the Army;

"(4) contract, with the consent of his parent or guardian if he is a minor, with the Secretary of the Army to serve for the period required by the program;

"(5) agree in writing that he will accept an appointment, if offered, as a commissioned officer in the Army Reserve or the Army National Guard of the United States; and

"(6) agree in writing that he will serve in such reserve component for not less than eight years.

Performance of duty under an agreement under this subsection shall be under such terms and conditions as the Secretary of the Army may prescribe and may include periods of active duty, active duty for training, and other service in an active or inactive status in the reserve component in which appointed.

"(c) The Secretary of the Army shall provide for the payment of all expenses of the Department of the Army in administering the financial assistance program under this section, including the cost of tuition, fees, books, and laboratory expenses which are incurred by members of the program appointed as cadets under this section while such members are students at a military junior college.

"(d) Upon satisfactorily completing the academic and military requirements of the program, a cadet may be appointed as a reserve officer in the Army in the grade of second lieutenant, even though he is under 21 years of age.

"(e) the date of rank of officers appointed under this section in May or June of any year is the date of graduation of cadets from the United States Military Academy in that year. The Secretary of the Army shall establish the date of rank of all other officers appointed under this section.

"(f) A cadet who does not complete the course of instruction, or who completes the course but declines to accept a commission when offered, may be ordered to active duty by the Secretary of the Army to serve in his enlistd grade for such period of time as the Secretary prescribes but not for more than four years.

"(g) In computing length of service for any purpose, an officer appointed under this section may not be credited with service as a cadet or with concurrent enlisted service.

"(h) (1) The Secretary of the Army shall appoint not less than 10 cadets under this section each year at each military junior college at which there are not less than 10 members of the program eligible under subsection (b) for such an appointment. At any military college at which in any year there are fewer than 10 such members, the Secretary shall appoint each such member as a cadet under this section.

"(2) If the level of participation in the program at any military junior college meets criteria for such participation established by the Secretary of the Army by regulation, the Secretary shall appoint additional cadets under this section from among members of the program at such military junior college who are eligible under subsection (b) for such an appointment.

"(i) Cadets appointed under this section are in addition to the number appointed under section 2107 of this title.".

(2) The table of sections at the beginning of chapter 103 of such title is amended by inserting after the item relating to section 2107 the following new item:

"2107a. Financial assistance program for specially selected members: military junior colleges.".

(d) Section 2108(d) of such title, relating to advanced training after receiving a baccalaureate degree or completing preprofessional studies, is amended by striking out the second sentence and inserting in lieu thereof the following: "If a member of the program has been accepted for resident graduate or professional study, the Secretary of the military department concerned may delay the commencement of that member's obligated period of active duty, and any obligated period of active duty for training or other service in an active or inactive status in a reserve component, until the member has completed that study. If a cadet appointed under section 2107a of this title has been accepted for a course of study at an accredited civilian educational institution authorized to grant baccalaureate degrees, the Secretary of the Army may delay the beginning of that member's obligated period of service in a reserve